(5)

No. 87-6026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Missouri

---

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Whether the infliction of the death penalty on an individual who was a child of 16 at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the Missouri Supreme Court is published as *State* v. *Wilkins*, 736 S.W.2d 409 (Mo. banc 1987). The opinion is reproduced in the Joint Appendix.

Although there is no formal or reported trial court opinion, the Judgment and Sentence filed in the Circuit Court of Clay County, Missouri is set forth in the Joint Appendix.

Also set forth in the Joint Appendix is the Certification Order in which the Juvenile Court of Clay County, Case No. JU185-132J, relinquished jurisdiction to allow the prosecution of Petitioner as an adult.

JURISDICTION

The Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Missouri Supreme Court was entered on September 15, 1987. The Missouri Supreme Court denied a timely petition for rehearing on October 13, 1987. The petition for a writ of certiorari was filed on December 8, 1987 and this Court granted the petition for writ of certiorari on June 30, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

> "No State shall . . . deprive any person of life . . . without due process of law. . ."

STATEMENT OF CASE

I. Court Proceedings

Heath Allen Wilkins was 16 years old on July 27, 1985 when, in the late evening hours, he and Patrick Stevens

entered Linda's Liquors in Avondale, Clay County, Missouri, and robbed it (Tr. 129-130).[1] In the course of the robbery, appellant stabbed the clerk, Nancy Allen, who died from her wounds (Tr. 124, 130; J.A. 79). Earlier in the evening, Heath had ingested a quantity of alcohol and, within four hours of the murder, had taken a "hit" of LSD, the last of three hits taken that day (Tr 254; J.A. 35). Heath was apprehended fourteen days later, on August 10, 1985 (J.A. 83).

Because Heath Wilkins, a child in Missouri,[2] had committed an act which violated state law, the juvenile court had exclusive original jurisdiction over him. Mo. Rev. Stat. § 211.031.1(3) (1986). On August 15, 1985, the juvenile officer moved, pursuant to Mo. Rev. Stat. § 211.071.1 (Supp. 1984), to have "the petition heretofore filed in the interest of the juvenile" dismissed (J.A. 4), thereby permitting Heath to be tried as an adult. After "receiving testimony and other evidence", the juvenile court granted the motion, (J.A. 4-6) finding, in relevant part, that:

> In light of the facts, it is reasonable to conclude from a practical standpoint that only 17 months of rehabilitative confinement or treatment are available and that based upon the crime and the juvenile's present circumstances, such a period is not adequate to rehabilitate him and to protect society from him.

(J.A. 4). Heath was then charged by information with first degree murder,[3] armed criminal action,[4] and unlawful use of a weapon[5] (J.A. 2-3).

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[1] Heath's girlfriend, Marjorie Filipiak, and another friend, Ray Thompson were aware of and involved in the robbery plan but neither was present at the scene (J.A. 81).

[2] A child is any person under seventeen years of age. Mo. Rev. Stat. § 211.021 (1986).

[3] Mo. Rev. Stat. § 565.020.1 (Supp. 1984)

[4] Mo. Rev. Stat. § 571.015 (Supp. 1984)

[5] Mo. Rev. Stat. § 571.060 (Supp. 1984)

On October 17, 1985, Heath entered pleas of not guilty and not guilty by reason of mental disease or defect excluding responsibility (J.A. 1). The circuit court ordered that he be examined to determine his competency to stand trial.[6] At defense counsel's request, the court ordered a second psychiatric evaluation (Tr. 5).

A competency hearing was held on April 16, 1986 (J.A. 1). Dr. Steven Mandracchia, a clinical psychologist for the State of Missouri, Department of Mental Health, testified that he saw Heath Wilkins on November 27, 1985 (Tr. 9), and estimated that he spent approximately one hour and thirty-five minutes with him (Tr. 9). A member of Mandracchia's staff administered the Minnesota Multiphasic Personality Inventory (Tr. 9). No other psychological testing was done, and no physical examination was performed (Tr. 10).

Mandracchia testified that in his opinion Heath was not suffering from "mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri" (Tr. 11)[7] Mandracchia would not state an opinion as to mental illness beyond the parameters of the statute (Tr. 11). Mandracchia was not aware of Heath's desire to seek the death penalty when he interviewed him in November

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[6] Mo. Rev. Stat. § 552.020 (Supp. 1984)

[7] Mo. Rev. Stat. § 552.010 (1986). Mental disease or defect defined. —The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

(Tr. 12). Nonetheless, he was unequivocal in his opinion that Heath Wilkins was competent to proceed (Tr. 12), and competent to make the decision to plead guilty in order to seek the death penalty (Tr. 14-15).

Dr. William S. Logan, psychiatrist and director of law and psychiatry at the Menninger Foundation in Topeka, Kansas, testified based on a five hour interview he conducted with Heath on March 20, 1986 (Tr. 17). Dr. Melvin Berg, an associate of Logan's, administered six hours of psychological examinations including the Thematic Apperception Test, the Rorschach Test, the Animal Choice Test, and an intelligence test, the Wechsler Adult Intelligence Scale, Revised (Tr. 17). Dr. Logan did not wish to provide a definite conclusion concerning the legal standard of competency to stand trial (Tr. 19). He set before the judge his view that Health Wilkins had adequate cognitive skills to proceed (Tr. 19), but was "psychiatrically ill" with emotional problems which impaired his judgment, but not the extent that he was totally out of touch with reality (Tr. 32). He left it to the judge to determine whether, under those circumstances, Wilkins was competent to proceed (Tr. 22-23).

Logan was also questioned about Heath's desire to be put to death (Tr. 30-37). When asked by the prosecutor if Heath's decision was logical, the following colloquy took place:

> A. The distinction, I suppose, becomes one of whether it's a rational decision. And that I will leave to wiser souls than I. But, it makes sense on the surface of it if viewed from the one perspective.
>
> Q. Okay. In other words he'd rather spend as little time in prison as possible and take the death penalty and not go through what he thinks would be the torture of life in prison, is that, is that kinda the bottom line?

> A. Roughly, yes, with the additional component that I do not believe he has a very good understanding of the fact that even if he were to take the route he would still spend a considerable amount of time in terms of years on death row.
>
> He seemed to expect that the sentence would be rather, administered rather quickly and would not involve a lot of waiting.
>
> Q. Well, that may or may not be, you know, we don't know how many years.
>
> A. But it won't be done next month. I believe that was more of the term he was thinking of.

(Tr. 31-32).

The circuit court found Wilkins competent to proceed (Tr. 42). Immediately thereafter, Fred Duchardt, Heath's attorney, informed the court that Heath wanted him to withdraw as counsel so that he could proceed *pro se* (Tr. 42), making it clear that Heath wanted to plead guilty in order to seek the death penalty (Tr. 42). The court then questioned Heath as to his age (17); his education (ninth grade); and his legal knowledge (none) (Tr. 44). The judge ordered Heath to think about his decision for one week, stating, ". . . you are a young man. You have a lot of years ahead of you." (Tr. 59).

One week later, the court accepted Heath's waiver of counsel (Tr. 84), and permitted his attorney to withdrew.[8] Heath then informed the court that he wanted to plead guilty to all charges (Tr. 90). After again explaining all of the legal rights he would be waiving (Tr. 90-93), the court informed him that it was "quite likely," if he persisted in seeking the death penalty, he would get it (Tr. 93). The court also gave him what was intended to be a frightening

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[8] Fred Duchardt was ordered to remain available for consultation (Tr. 87-88).

description of death by lethal gas and strongly suggested that he change his mind (Tr. 94). Heath reiterated his desire to plead guilty and the judge set the guilty plea hearing for two weeks later (Tr. 95).

On May 9, 1986, the hearing to accept the plea was held. The guilty plea forms for each charge were reviewed (Tr. 10).[9] The court engaged in a colloquy with Heath concerning the rights being waived (Tr. 116-124). Heath presented a truncated version of the offense, which was then expanded by the prosecutor and adopted by Heath (Tr. 124-131). The court again reviewed the rights being waived by the plea, and asked if there was any information other than that contained in the reports on competency (Tr. 135). Mr. Duchardt informed the court that there was a considerable amount of additional information, from inpatient mental health diagnostic and treatment centers where Heath had been confined during his childhood, and additional information in juvenile court records (Tr. 136-37). The court noted that it had heard the testimony of Drs. Mandracchia and Logan on April 16th and had found Heath competent at that time. After establishing that Heath "agreed with the recommendation and with the opinions of the doctors that [he was] competent to proceed" (Tr. 137), and that Heath still believed himself competent (Tr. 138), the court accepted Heath's plea of guilty to the class A felony of murder in the first degree (Tr. 144).

At the sentencing hearing on June 27, 1986 (J.A. 1), the court encouraged Heath to change his mind about self-

[9] Mr. Duchardt noted that Heath's only consultation with him since the last hearing concerned how to answer a question on a waiver form relating to mental illness (Tr. 106). Paragraph 17 states: "I have not in the past suffered from any mental disease or illness and have never been treated by a doctor or psychiatrist for a mental or emotional condition other than: ____." Mr. Duchardt had advised Heath just to refer to the reports already before the court (Tr. 106).

representation (Tr. 189-190). Heath made it clear that his ignorance of the law was of no consequence since he did not want to "make a defense" (Tr. 190).

The State presented evidence at the sentencing hearing concerning the circumstances of the offense. Photographs of the victim and the crime scene were offered and admitted (Tr. 194-213), a police officer read Heath's inculpatory statement taken the date of his arrest (Tr. 214-228), and the victim's husband testified as to ownership of the establishment and the amount of missing money (Tr. 231), all without objection.

The State then presented a chronology of Heath's prior involvement with state agencies and the juvenile court system (Tr. 234-37). Heath sat patiently until the witness began to describe the specific mental health facilities to which he had been remanded. He then objected, stating

> Those years back, on my childhood, I've grown up. I can understand some technicalities and stuff from my mental records and everything . . . . I just don't see how those technicalities, those things in my background and all of that has to do with helping make the decision.

(Tr. 237). The objection was sustained. Similar objections to potentially mitigating evidence were sustained throughout the remainder of the hearing (Tr. 241, 260, 269).

The State then called Dr. Logan, who testified to Heath's statement to him concerning the homicide. He testified without objection until reaching the point at which the victim was stabbed. Heath then objected that the prosecutor was reviewing the issue of guilt, which had already been decided. The objection was sustained (Tr. 260). Dr. Logan finished his testimony by describing Heath's background. He was asked by the prosecutor whether Heath committed the crime while under the

influence of extreme mental or emotional disturbance,[10] and he opined that Heath had been emotionally disturbed (Tr. 272-73).

In closing statements, both the prosecutor and Heath asked that the death penalty be imposed (Tr. 289-98).[11]

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[10] Mo. Rev. Stat. § 565.032.3 (Supp. 1984) lists as a mitigating factor: "(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance."

[11] Heath's statements concerning his desire to receive the death penalty throughout the proceedings were somewhat muddled. At the start of the sentencing hearing he was asked when he had decided he wanted to receive the death penalty. He stated: "I'm, I'm telling you, you know, I never stated flat out that I want the death penalty . . . . I stated that I would prefer the death penalty over spending life in prison, you know." (Tr. 186-87).

In his closing argument, the following exchange took place:

> . . . What I would like for you to look at and take into consideration is for capital murder, murder in the first degree, it's either life imprisonment or , life imprisonment without possible probaton or parole or any other type of release, and the death penalty.
>
> Now, I'd say this is more based on personal observation than anything, that I'm asking the court to consider the death penalty as a more humane in the extent of possible happenings and pain received by, you know, me, what I'd go through, either one.
>
> Not that I'd, I'm not stating that I would deserve it, I'm just, that's my personal feelings.
>
> One I fear, the other I don't.
>
> That's all.
>
> The Court: I want to make sure I understand you, are you requesting that the court impose one or the other?
>
> Defendant: Yes, Your Honor.
>
> The Court: Which?
>
> Defendant: I'm asking the Court to impose preferably the death penalty over life imprisonment without—

(Tr. 295-96).

* * *

> Now I've seen—I would say that I just feel, I've seen how people react concealed, you know, when you're contained in small

> things I know how people react.
>
> And I know I don't like that. And that, I've seen what it has done to people and how it makes people feel, firsthand experience, plus I've seen observations on the impact of others.
>
> Now, I'm not saying it's always bad, but I've just seen it. And I'd say I'd rather have a punishment that leaves no scars on myself, you know.
>
> * * *
>
> Either way, you know, the end is going to be the same, just one I'm gonna die slower until it satisfies or it's in the opportunity for others, for what makes it convenient for them.
>
> Either way the end is gonna be the same, I'm just asking for it this particular way, that's all (Tr. 297-98).

The judge imposed the death penalty, finding two aggravating circumstances: 1) the murder was committed during a robbery;[12] and 2) "the murder involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman." (Tr. 300-301).[13] The judge did not specify mitigating circumstances considered or found.

Heath did not take any of the steps necessary under Missouri law to appeal his conviction and sentence. The Missouri Supreme Court ordered the State Public Defender to enter the case as *Amicus Curiae* and to brief and argue "any issue subject to review." (J.A. 80). Heath was allowed to appear before the Supreme Court and make a statement. After hearing his statement and the argument by *Amicus*, the Missouri Supreme Court ordered that Heath be evaluated as to his competence to waive his right to counsel on appeal (J.A. 80).

The psychiatrist who conducted the competency examination, Dr. S. D. Parwatikar, found that Heath "was not competent to waive his constitutional rights and repre-

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[12] Mo. Rev. Stat. § 565.032.2(11) (Supp. 1984): "The murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery."

[13] Mo. Rev. Stat. § 565.032.2(7) (Supp. 1984).

sent himself in front of the court." (J.A. 74). Counsel was then appointed to represent Heath and the case was briefed and argued again (J.A. 80).

On September 15, 1987, the Missouri Supreme Court affirmed the conviction and death sentence in a 4-3 decision. Although counsel had asked the Court to find that the death sentence was cruel and unusual and therefore unconstitutional under the Eighth and Fourteenth Amendments because Heath was only 16 years old (Appellant's Brief at 62-73), the Court did not address the issue. The Court instead held that it had "repeatedly rejected constitutional challenges to Missouri's death penalty provisions" . . . and that the "Supreme Court of the United States has held that the death penalty is not *per se* cruel and unusual punishment prohibited by the Eighth Amendment." (J.A. 88).

II. Heath Wilkins' Development And Background

Heath Wilkins was born on January 7, 1969, to Sherry Wilkins, who was nineteen years old at the time (CC 129).[14] Heath was her second child. Her older son, Jarrod, had been born two years earlier while she was still in high school (J.A. 39).

His father left the home when Heath was three or four years old. During his time in the home, Mr. Wilkins had been arrested for physically abusing Sherry Wilkins (P.P.R. 4).[15] After his parents divorced in 1972, his father was committed to a mental institution in Arkansas. Heath had no contact with him after 1974 (P.P.R. 4).

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[14] Reports from the Crittendon Center are part of the record and will be denominated CC throughout.

[15] The Probation and Parole Report is a part of the record and will be denominated P.P.R. throughout.

Heath's mother had little idea of how to provide an environment in which a child could thrive and mature. She herself had been raised by an alcoholic father who "probably physically and sexually abused her." (J.A. 39). Her notion of discipline was to put the boys in a room by themselves with a piece of tape on the door. If the tape was broken when she checked it, she would beat them, sometimes for as long as two hours (J.A. 57). She used drugs and kept drugs around the house (J.A. 42). She worked nights and slept during the day, leaving Heath and Jarrod with a baby-sitter who sexually fondled Heath (J.A. 29; Tr. 261) and used drugs in his presence (Tr. 261). Mrs. Wilkins had a live-in boyfriend who had a quick temper and would slap Heath for the smallest reason, like walking in front of the television set when the boyfriend was watching it (J.A. 29). Heath's mother would side with the boyfriend when such incidents occurred (J.A. 57-58). Heath ran away several times, and by age ten was sleeping with a knife hidden under his mattress (J.A. 39).

Heath's closest relationship was with his mother's brother, with whom he stayed during the summer. When Heath was in kindergarten this uncle introduced him to marijuana. His mother and uncle joked about this (J.A. 29). His uncle also taught him how to shoot guns (J.A. 29). By age seven, Heath was setting fires and robbing houses (P.P. R. 5).

Heath first came to the attention of the authorities when he was eight years old, for wrecking a tractor (Tr. 234). He was given a warning and released to his mother's care (*Id.*) A year later he broke into a house with some other children and stole money (*Id.*). Again, he was given a warning and released to his mother's care. A year later, he broke into a store to steal money, this time with his brother Jarrod (Tr. 234).

Around this time, at age ten, it was learned that Heath had devised a plot to poison his mother and her abusive

boyfriend. He bought poison from a gardening store and tried it out on a neighborhood dog. The dog died. He then put the poison in Tylenol capsules (J.A. 29). Jarrod learned what he had done, and told his mother. Without telling Heath, his mother emptied the poison from the capsules and then made him eat them. Heath tried to induce vomiting by sticking a finger down his throat (J.A. 58). His mother and her boyfriend then beat him (*Id.*). When recalling why he had put poison in the capsules, Heath explained that he thought if his mother got sick, she would "break up" with the boyfriend (J.A. 29).

At the age of ten, Heath was referred to the Tri-County Mental Health Center by his mother under pressure by the Juvenile Court (J.A. 39). Heath was evaluated by mental health professionals, found to be in need of professional treatment, made a ward of the state until he was seventeen, and placed with the Division of Mental Health (Tr. 235). He remained in state custody—almost exclusively in mental health facilities—from age ten until shortly before the homicide (Tr. 234-36).

Jarrod was also institutionalized, at least as early as 1982 and possibly before (CC 48). Jarrod was found to be mentally ill, and was diagnosed as schizophrenic (J.A. 42).[16]

Heath's mother had difficulty accepting the fact that both her sons had "psychotic potential" (CC 106). She tended to minimize Health's disabilities, and to resist

[16] As Dr. Logan noted, "The presence of substance abuse and mental illness in the patient's only sibling also raises questions about a genetic component to the patient's chronic behavior problems." (J.A. 47). Dr. Parwatikar noted that mental illness in both Heath's father and brother "presents a strong possibility of genetic predisposition to mental disorder which may have contributed to his distorted reasoning." (J.A. 74).

treatment for him, or remove herself from his treatment, as described more fully below.[17]

Interviews and psychological testing at the Tri-County Mental Health Center revealed that at age ten Heath was "highly conflicted emotionally with high anxiety and inner turmoil. This conflict stem[med] from the home environment." (J.A. 40). He was tearful and depressed, unhappy about "not receiving any attention from his mother" and "fantasized about a possible relationship with his father which does not exist." (J.A. 39). He openly talked about suicidal or homicidal acts. "The possibility of a thought disorder was considered because at times [his] . . . confusion approached paranoid ideation." (J.A. 40). It was recommended that he be hospitalized for intensive psychotherapy (*Id.*) He was transferred from Tri-County to the Western Missouri Mental Health Center, where he remained for a few weeks for additional testing and diagnosis. The findings and recommendations were consistent with the findings at Tri-County (J.A. 40).

In January, 1980, just after his eleventh birthday, Heath was transferred to the Butterfield Youth Services, a residential treatment facility for mentally disturbed children. He did not receive the intensive psychotherapy that had been recommended, but was engaged instead in "activities" therapies (art and recreation) and some individual counseling (J.A. 43), but "not with a highly skilled person" (Tr. 26). His family situation was never discussed, and his family was not involved in treatment (Tr. 27).

[17] Heath's mother admitted to the pre-sentence investigator that while Heath was growing up "she did not have time for [him] . . . because of her preoccupation with his older brother Jarrod. She admitted denying existence [sic] of serious problems with Heath even though they were pointed out by authorities at Butterfield and Crittenton." (J.A. 57).

Heath remained at Butterfield for three and one-half years, and during that time his behavior deteriorated (Tr. 28; J.A. 44). His I.Q. decreased by twenty points, most likely because of drug abuse, particularly the use of inhalants which are known to cause brain damage (Tr. 29). He also frequently smoked marijuana, some of which he grew himself (J.A. 30), and had his first experience with LSD, which he stole from another patient (Tr. 264; J.A. 30). While at Butterfield, he suffered from "stressed-induced headaches" (J.A. 41) and he was prescribed the anti-psychotic medication Mellaril[18] "for a disoriented thinking pattern and high anxiety." The prescribing psychiatrist was aware of Heath's drug abuse, but did not feel the disorientation could be attributed to drugs. He believed Heath might have a schizotypal personality or developing schizophrenia (J.A. 43).

Heath had frequent thoughts of suicide while at Butterfield and made three suicide attempts: once by cutting his wrist, and twice by attempting to overdose on prescribed or illicit drugs (J.A. 31).[19] Testing showed that he had a poor self-concept, lacked basic trust and was suspicious of authorities (J.A. 41). Heath himself "reported having a vivid imagination and suspected he might be 'crazy because of my thoughts.'" (J.A. 41). He made "bizarre derogatory sexual comments toward women prior to visits with his mother . . . . The mother was described as passive and did not talk to the patient." *(Id.)* For the last six months of 1981, his mother stopped all contact with

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[18] Physician's Desk Reference 1870-71 (42 ed. 1988)

[19] At some point before his stay at Butterfield (the time is unclear from the record), Heath attempted suicide by jumping off a bridge into the path of an oncoming car. The car swerved and missed him. "He described in vivid detail he had imagined that the impact would break his legs, throw him over the hood, the windshield, and then onto the pavement." (J.A. 31).

him, and he began to further deteriorate. He "with[drew] into a fantasy life and was suspicious of adults and peers." (J.A. 42). He sought excitement "through drugs and hyperventilating." *(Id.)*

Heath was allowed home visits in 1982. It was later learned that his mother had drugs in the home and that Heath brought drugs back to the institution after these visits (J.A. 43). He was suspended from the eighth grade for fighting with another student and because he engaged in "bizarre" behavior (J.A. 43).

In May, 1983 (J.A. 44), Heath was transferred to the Crittendon Center in an attempt to gain some family involvement and increase his motivation (J.A. 44).[20] During the first few months of his stay, he isolated himself from the program and exhibited "bizarre" behavior and thought processes (CC 91), including paranoid ideation (CC 93).[21] He was referred for psychological testing because "staff feared that a decompensation might be imminent. From time to time he has expressed unusual ideas, suspicious attitudes, and unpredictable behaviors that lead people to wonder whether there might be a psychotic organization behind his rather cautious and composed exterior." (CC 50). The treating psychiatrist initially prescribed thorazine, a powerful anti-psychotic drug[22] (CC 80, 81). After two months, Mellaril was prescribed (CC 81). The staff consistently resisted Heath's return to his mother's custody, but he was allowed home

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[20] His brother Jarrod was at Crittendon at this time.

[21] For example, on an outing to a zoo, Heath accidentally bumped into a woman. He "then felt this woman and a whole group of people walking [with] her were staring at him. Also some of his conversation . . . [with the writer of the report] was fragmented and didn't make sense." (CC 94).

[22] Physician's Desk Reference 2036-39 (42 ed. 1988)

visits.[23] His discharge was delayed, and it was recommended that he be sent to a group home instead (CC 116).[24]

A progress report by the treating psychiatrist one month before Heath's release found that he was emotionally isolated, reacted impulsively, immaturely, and in a self-centered, selfish manner (CC 70). A treatment review around the same period of time reported that he functioned "best in situations where he experiences a considerable amount of structure and guidance from the staff and, in fact operate[d] best in those situations with staff individuals whom he ha[d] thoroughly tested and whose limits he [knew to be] . . . consistent." (CC 75).

The staff at Crittendon also had concerns about Heath's potential for violence, reflected in psychological tests and his own strange statements to them[25] (CC 102). He was

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[23] On his final visit, after the court had ordered imminent release to his mother's custody, Heath arranged for a number of his friends who were also released for visits to have a party together. "[D]uring the time that he and his peers [were] together unsupervised on pass, he was involved in drinking and was totally unsupervised by his mother. On return from the pass the mother indicated to Crittendon staff that Heath had gone hunting while he was on his pass and seemed to be in a very good mood and cooperated quite well with her during the pass." (CC 77).

[24] Heath's feelings about his home environment were reflected in his reaction to being told that he might be sent to a group home instead of being returned to his mother upon his release from Crittendon. He did not show "anger or resentment" at the idea, but said he felt that "the discipline and the structure of restrictions will not be too different in either situation." (CC 69). Love, support and nurturance are all noticeably absent from his equation.

[25] "7/11 Heath spent a lot of time talking about violence today. The conversation started with talking about various movies he had seen. All of the scenes he described were of extremely violent content but Heath didn't define them as violent. He only considered an incident violent if torture was involved. For example, he didn't consider a person's chest being instantaneously blown apart violent because the person didn't suffer. He said that the only thing that bothered him about killing people was all the things they would miss out on.

(CC 96). Heath's description of the stabbing of Nancy Allen to one psychiatrist was that he "stabbed [the victim] several times, it caused no pain and came automatically." (J.A. 37).

found to have potential for both destructive and self-destructive action (CC 51).

In November, 1983, the court ordered that Heath be released to his mother's home on condition that he participate in outpatient counseling and drug screening, and put him on probation (J.A. 44). Heath "really had no kind of supervision or tutoring or guidance in terms of how to use his mind to make rational, common sense decisions." (Tr. 24). He was impulsive and did not think through the consequences of his decisions (Tr. 22), and was very easily frustrated (Tr. 25). Within five months he was caught violating probation and possessing marijuana, breaking into a house and stealing (Tr. 235). The court allowed him to stay with his mother (Tr. 236). Two months later he again violated probation by running away to California (Tr. 266). Upon his return, he was remanded to the Division of Youth Services and placed in the Northwest Regional Zone facility, the most structured available, where he stayed for six or seven months (Tr. 236). Thorazine was again prescribed (J.A. 32, 59), but he claimed he only took it when he was "stoned," resisting it because it was the medication Jarrod took (J.A. 32).

Heath was released from the Northwest facility to foster care (Tr. 236). He ran away from his foster parents and lived in a friend's basement for two months (J.A. 59). In 1985, the State relinquished custody of him after he offered to join the Job Corps in Utah. He stayed in Utah for one week before returning to Kansas City (J.A. 33).

At first "[h]e viewed his return to Kansas City as an 'opportunity for a new start and determined to go straight '" (J.A. 9). However, his mother failed to relay calls about employment (J.A. 33) and because he was "devoid of skills or ability to modulate his emotions, he quickly fell vulnerable to frustration, despondency, and emptiness to which he responded by resorting to the established pattern of impulsive thrill seeking, drug consumption and thefts" (J.A. 49). Because his mother refused to allow him to live in her home (P.P. R. 5), Heath lived "on the streets" from May of 1985 until the time of his arrest in August, 1985. He slept in the park (J.A. 33). His drug abuse increased, particularly his use of "acid" (LSD), his favorite drug (Tr. 253; J.A. 33). His drug and alcohol use became "a fairly continuous thing" (Tr. 253).

Living on the streets, Heath and his friends would steal alcohol and drink together in the evenings, playing a game where they would throw knives at each other's feet (J.A. 35). Although he now had a girlfriend, his only true human connection, "he recalled he could not stand to be touched" (J.A. 35).

The report of the psychologist who tested Heath in April, 1986, described Heath's thought processes and emotional state several months after the homicide, after he had turned seventeen. While his I.Q. was average, the tests showed "a pattern of abilities and deficits suggestive of an impulsive cognitive style which avoids careful reflection in favor of immediate action . . . . [H]e demonstrates a disinterest or inability to sustain logical and stepwise problem-solving efforts in situations calling for careful and deliberative thought" (J.A. 16). Heath had an "inaccurate, vague and midly distorted understanding of social conventions and the rationale for how and why social mores and customs are established" (J.A. 17).

> Particularly when stirred by feelings, his thinking becomes temporarily disorganized and permeated by highly personalized fantasies which temporarily push him toward the outer limits of what is commonly accepted as reality and good sense. When depressive or angry affects are aroused, his thinking deteriorates, becomes diffuse, and so dominated by feeling that his thoughts then function more as a form of emotional discharge than as a rational means of understanding reality and coming to grips with problems.

(J.A. 18).

The psychologist noted that Heath has "little trust in others from whom he expects primarily indifference or destructive attack" (J.A. 20), although he detected an "incipient potential for attachment and concern which leaves him vulnerable to feelings of loss and longing" (J.A. 20). Heath's vulnerability to being overwhelmed by feelings of rage and despair had predictable results.

III. The Robbery And Murder

Heath spent the day of the murder in the park or mall with his friends. "He did not think about the future as he lived on a day-to-day basis" (J.A. 34). He had taken LSD about three times that day (J.A. 59). The last "hit" had been at 7:30 or 8:00 p.m. (J.A. 35). He had also been drinking fairly heavily (Tr. 254). He felt himself becoming violent, threatened one of his friends with a knife for talking to his girlfriend and pushed him down. Another friend told him to "cool down" and took the knife away from him "as they had a job to do that night" (J.A. 35).

The robbery was carefully planned, in that Heath and his three friends took separate cabs to a hospital not far from the store they planned to rob (Tr. 220), brought changes of clothes (Tr. 129), waited for customers to leave before entering the store (Tr. 221), and wiped their shoes to avoid leaving footprints (J.A. 36). In some versions of his story about the homicide, Heath contended that it,

too, was planned because he did not want to leave witnesses (Tr. 126, 128). In other versions, he "described that it was almost 'instant anger.' He saw his actions as stupid but was 'consumed.' He realized his actions did not make sense and could think of no plausible reason for his action when questioned why it was necessary to kill the woman" (J.A. 37).[26] Dr. Logan characterized the homicide as "the rageful, impulsive enactment of a fantasized crime by one responding to his own hopelessness, rage, and frustration. Only after the act did the patient realize the full consequences of his behavior . . . . His crime seems committed as much out of realization of the deadness of his own life as out of malevolence" (J.A. 49-50). The trial judge did not find the "witness elimination" aggravating circumstance argued by the prosecution (Tr. 292).[27]

According to the evidence at the hearing on the plea and at sentencing, shortly after Heath and his friend "Bo" entered the store, Bo went to the bathroom and Heath asked Nancy Allen to make him a sandwich (Tr. 129). As

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[26] Heath initially told the police a story consistent with his paranoia, which was that he believed the victim made fun of him, and he was going to get back at her (Tr. 219). He later claimed that he made the statement to "play" crazy, but decided better of it when he thought about returning to a mental institution (J.A. 36).

At the last psychiatric interview, while trying to waive counsel for his appeal, he denied any intention before the robbery to hurt anybody (J.A. 62). He also "recalled that his experiences (at the mental institutions) were rather horrifying. [He] dwelled rather extensively at his experiences at being put in a straightjacket and being 'pumped up with thorazine,' causing him to feel like a 'zombie'" (J.A. 62). He also alluded tangentially to sexual abuse he suffered at one of the institutions where he resided, although it is not clear which one (J.A. 62).

[27] Mo. Rev. Stat. § 565.032.2(12) (Supp. 1984): The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness.

she was making the sandwich, Bo came out from the bathroom and grabbed her, while Heath stabbed her. Bo took some merchandise and money, and asked a question, which Ms. Allen answered (Tr. 226). Heath began to stab her again, "to shut her up" knowing she would die from the wounds (Tr. 130). She had been stabbed a total of eight times, once in the back, four times in the neck, and three times in the chest (Tr. 202).

After the crime, Heath and Bo returned to the other two friends waiting at the hospital, took cabs to the bus station and split the money (Tr. 130). Heath and his girlfriend went to the video arcade to play (J.A. 38), and then returned to the park, where they took more "acid" (Tr. 223). "It was Sunday night before he realized what he had done" (J.A. 38). When he heard Bo bragging about the robbery, he realized they would get caught but despite the urging of his girlfriend, decided not to run away because '[i]t didn't matter anymore. I didn't care.' He decided just to get 'wasted.' He told his girlfriend to go home and he 'stayed stoned.'" (J.A. 38). When the police came to arrest him, he said "he had thought about crying but was silent because he realized there was no one to help him" (J.A. 38).

SUMMARY OF THE ARGUMENT

In this case, the Court is asked to determine whether death is a disproportionate sentence not for those children who are exceptional for their maturity and good judgment, but for those who are exceptional because they lack even the immature judgment and limited self-control of the average 16-year-old.

The Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards." *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958). In determining what those civilized standards are,

this Court must look to the objective evidence of society's judgment, including legislative enactments, jury verdicts, and the position of respected organizations and religious leaders. *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2691-92 (1988).

American society treats children differently than adults in a multitude of areas. This differential treatment is based on the recognition that children are peculiarly vulnerable, incapable of mature decision-making, and are still dependent on parents or guardians for care and guidance.

Society's judgment that children should be treated differently than adults includes the issue of capital punishment. Thirty-one states, or almost two-thirds of the country, would not permit the execution of an offender who committed his crime at, or below, the age of 16. In those jurisdictions which do not prohibit the practice, juries and prosecutors reflect this judgment by refusing to utilize the death penalty as punishment for 16-year-olds.

Had Heath Wilkins not asked to be sentenced to death, it is extremely unlikely that he would now be on death row. He is one of 16 offenders who have been charged with a capital offense in Missouri at the age of 16 or younger and certified to be tried as an adult since 1977. He is the only one sentenced to death.

Missouri's experience is not unique. There has been a dramatic decline in the number of people on death row for crimes committed while 16 or younger. None of the seven 16-year-olds currently on death row was sentenced to death in a state which has "rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of [17] at the time of the offense." *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring).

Additional evidence of a national consensus against executing 16-year-olds can be found in the opinions of American citizens, respected professional groups involved with our legal system, and the moral arbiters of society, the nation's religious leadership. Finally, evidence exists that the international community disapproves of the execution of 16-year-old children.

This Court should add its own informed judgment to the pervasive consensus evidenced by these objective standards, that the execution of any person for a crime committed before the age of 17 offends our current standards of decency.

A punishment is unconstitutionally excessive if "it makes no measurable contribution to acceptable goals of punishment." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). The two legitimate penological goals served by the death penalty are retribution and deterrence, *Gregg* v. *Georgia*, 428 U.S. 153 (1976), neither of which would be served by the execution of 16-year-old offenders.

Retribution can only be served if the community feels that an offender has gotten what he deserves for the harm he inflicts. What an offender "deserves," depends on an assessment of that offender's moral culpability.

Sixteen-year-olds lack the capacity to truly understand the nature and consequences of their actions. True understanding comes from experience and maturity, attributes not found in 16-year-olds. Nor do 16-year-olds have the same capacity as adults to understand and control their emotions and impulses. A person who is responding to impulses beyond his control has traditionally been viewed as less culpable than the cold-blooded, rational criminal. *See California* v. *Brown*, 479 U.S. 538, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Finally, because 16-year-olds are still of an age to require parental control, parents and/or guardians are to some extent responsible

for harm inflicted by the child. Youth crime should be viewed as a failure of the family and society. This is especially true of juveniles who commit murder, who share a common background of inadequate supervision, parental brutality, neglect, and severe psychopathology.

Retribution is not served by the execution of 16-year-old offenders who do not share with adults the capacity for mature judgment and control of behavior.

Deterrence is not served by the execution of 16-year-old offenders because 16-year-olds, as a class: 1) do not contemplate the consequences of their actions; and 2) do not fear death. Any potential deterrent effect the death penalty might have for 16-year-olds is completely negated by the infrequency of its use.

Even if this Court were to decide that the execution of those who committed their crimes while under the age of 17 is not *per se* cruel and unusual punishment, the execution of Heath Wilkins would violate the Eighth and Fourteenth Amendments. In sentencing him to death, the State of Missouri failed to carefully consider his age, maturity or moral responsibility.

The statutory mechanism utilized to transfer Heath Wilkins from juvenile court to the court of general jurisdiction did not involve an assessment of maturity. All that was required was a finding that Heath Wilkins had committed a very serious offense, and that the juvenile court system did not have the capacity to respond adequately.

Once transferred to the court of general jurisdiction, Heath Wilkins was considered and treated as an adult. Age was irrelevant to the circuit court's determination that Heath was competent to represent himself and plead guilty. The court and the prosecutor either ignored or failed to recognize evidence of Heath's immaturity. No individualized consideration of Heath Wilkins' age, maturity or moral responsibility was possible because no one involved in the process had any interest in seeing that they were considered. Finally, the Missouri Supreme Court made it clear that because Heath Wilkins had been found mentally competent, his age at the time of the offense was irrelevant.

Heath Wilkins typifies adolescents who commit murder. He shares all of the characteristics: physical abuse, impulsivity, and severe psychopathology, found to exist in juveniles sentenced to death in this country.

The execution of Heath Wilkins would be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

ARGUMENT

I. INTRODUCTION

We have all met exceptional children who, at age 16, strike us as fully mature people with good judgment. When we encounter such a child, we tend to remark upon it because of the very fact that such a child *is* exceptional. Heath Wilkins was not such an exceptionally mature child. Based on experience and study, we can also safely say that none of the children who commit first degree murders are such exceptionally mature children. In this case, the Court is asked to determine whether death is a disproportionate sentence not for those children who are exceptional for their maturity and good judgment, but for those who are exceptional because they lack even the immature judgment and limited self-control of the average 16-year-old.

The Eighth Amendment forbids the imposition of cruel and unusual punishment.[28] U.S. Const., Amend. VIII.

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[28] The Eighth Amendment's ban on cruel and unusual punishment is applicable to the states through the due process clause of the Fourteenth Amendment. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1947).

"While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958). What these civilized standards are at any given time in history must be determined by the Court, whose judgment must be "informed by objective standards to the maximum possible extent." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). The Courts inquiry into societal standards of decency is one which examines the judgment of society as expressed in the accumulation of legislative enactments, jury verdicts, the position of respected organizations and religious leaders, and other available data. *See*, *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988). Petitioner submits that an examination of the objective criteria in this case will lead to the conclusion that death is a cruel and unusual punishment for a 16-year-old.

II. IN ALL IMPORTANT RESPECTS, 16-YEAR-OLDS ARE CONSIDERED BY CIVILIZED SOCIETY TO BE CHILDREN WHO LACK THE CAPACITY FOR MATURE JUDGMENT AND RESPONSIBILITIES

As American society has matured, so has its attitude toward children, especially those who commit crime. The punitive, retributive model of English common law has been replaced by a system which operates on the belief that young offenders "should be rehabilitated rather than punished," *see* Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology 1471, 1473-1475 (1983). Society's evolving attitude toward children who commit crime is amply illustrated by the fact that juvenile courts, in which children are treated and rehabilitated rather than punished, did not exist one hundred years ago. *In re Gault*, 387 U.S. 1, 14 (1967). Despite criticism of the juvenile court system, no one has argued that the ideal which spawned it should be abandoned.

> The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment.

McKeiver v. *Pennsylvania* 403 U.S. 528, 545-546 n. 6 (1971), *quoting* the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime* 7-9 (1967).

The Court has consistently recognized the State's right to treat children as a class differently than adults, noting that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . ." *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979). In *Bellotti* v. *Baird*, 443 U.S. 622 (1979), this Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. As the plurality in *Thompson* noted:

> It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determing whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.

Thompson, 108 S.Ct. 2693 n. 23 (plurality opinion). Indeed, the irony would be particularly striking if the existence of a few exceptionally mature 16-year-olds—who themselves would not be subject to capital punish-

ment—deprived the rest of the class of 16-year-old children of Eighth Amendment protection, when those few mature children are not permitted to evade class treatment where expansion of their rights is concerned.

The States treat children differently from adults in a multitude of areas. In Missouri, for example, there are more than 80 statutes which regulate conduct based on age. (See Appendix H). These statutes regulate every aspect of a 16-year-old child's life, from his inability to buy cigarettes,[29] to his ineligibility to vote.[30] Heath Wilkins could not have been an ambulance driver,[31] or a school bus driver,[32] in Missouri. He could not have bought a lottery ticket,[33] gone to the races,[34] or had a beer.[35] Heath Wilkins did not have the right to sue, or be sued,[36] or to control his own money.[37] Most ironically, Heath Wilkins could not, because of his age, sit on a jury[38] or witness an execution in the State of Missouri.[39] And yet, because the Missouri legislature has not expressly set a minimum age for capital punishment, Heath Wilkins can be put to death for a murder he committed at the age of 16.

Other states impose similar restrictions. As was true for the 15-year-olds discussed in *Thompson*, in no State

[29] Mo. Rev. Stat. § 71.740 (1986)

[30] Mo. Rev. Stat. § 115.133 (1986)

[31] Mo. Rev. Stat. § 190.145.2(1) (1986)

[32] Mo. Rev. Stat. § 302.272.1(2) (1986)

[33] Mo. Rev. Stat. § 313.280 (1986)

[34] Mo. Rev. Stat. § 313.670 (1986)

[35] Mo. Rev. Stat. § 311.310 (1986)

[36] Mo. Rev. Stat. § 507.110 (1986)

[37] Mo. Rev. Stat. §§ 404.007, 442.035 (1986)

[38] Mo. Rev. Stat. § 494.010 (1986)

[39] Mo. Rev. Stat. § 546.740 (1986)

may a 16-year-old vote or serve on a jury. *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2701-02 (1988), Appendices A and B. "[I]n all but four States a [16]-year-old may not marry without parental consent," and, in those states that have legislated on the subject, only two permit someone under the age of [17] to purchase pornographic materials. *Id.* at 2693, *citing* Appendices D, E and F. In fact, the only activity for which a number of states differentiate between 15-year-olds and 16-year-olds, is the right to drive without parental consent. *Thompson*, 108 S.Ct. at 2703-04, Appendix C.

As this Court noted in *Thompson*, our society's judgment that children are to be treated differently than adults extends to the issue of capital punishment. Eighteen states expressly set a minimum age for infliction of a death sentence. (See Appendix A). Fifteen of the eighteen prohibit the execution of anyone as young as 16.[40] Fourteen additional jurisdictions prohibit the death penalty in all cases,[41] and two more have statutes on the books but do not, or cannot, prosecute capitally.[42] Thus, thirty-one states, or almost two-thirds of the country, would not permit the execution of 16-year-olds.[43]

[40] Only Indiana, Kentucky and Nevada set the age at 16.

[41] Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin.

[42] South Dakota and Vermont. The Vermont statute has never been amended after this Court's decision in *Furman* v. *Georgia* and is clearly unconstitutional. 13 Vt. Stat. Ann. §§ 7101-7107 (1974).

[43] To determine contemporary standards of decency in this nation, it is necessary to survey the nation as a whole. To survey only those states which permit the death penalty in determining society's attitude on the issue of executing juveniles would be comparable to surveying only slave states in 1860 in determining whether the torture of slaves offended the standards of decency then in existence.

The bare numbers of jurisdictions prohibiting the execution of 16-year-olds do not tell the whole story. The trend is to *raise* the minimum age at which an offender may be executed. Since 1984, six states have raised their age limit or imposed an age limit to prohibit the execution of 16-year-olds.[44]

Obviously the question cannot be whether *any* State would permit such a punishment, because if the decisions of the state legislatures were determinative, there would be no need for the Eighth Amendment. And, as will be seen, what is prohibited by law in some jurisdictions, generally is avoided by practice in those without a prohibition. "The acceptability of a severe punishment is measured not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." *Furman* v. *Georgia*, 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring).

The State of Missouri has *never* in this century executed a person who was 16 years old or younger at the time of the offense. V. Streib, *Death Penalty for Juveniles*, 199 (1987). Less than one percent of all those people ever executed in this country were executed for crimes committed when they were 16 years old or younger. (See Appendix B). There has been no execution in this country of someone who was 16 years old or younger since 1959 (*Id.*).

Had Heath Wilkins not pleaded guilty, waived his right to a jury determination of sentence, and asked for the death sentence, it is extremely unlikely that he would now

[44] Those states are Colorado (from no specified limit to eighteen); Tennessee (from no specified limit to eighteen); Oregon (from sixteen to eighteen); Maryland (from fourteen to eighteen); New Jersey (from fourteen to eighteen); North Carolina (from fourteen to seventeen).

be on death row. Since the reinstatement of capital punishment in Missouri in 1977, 16 offenders who were 16 years old or younger at the time of the offense have been charged with first degree murder and certified to be tried as adults. Only Heath Wilkins received the death penalty. One who went to trial was acquitted[45] and two others were convicted of lesser degrees of homicide.[46] The State accepted guilty pleas to lesser degrees of homicide prior to trial in four cases;[47] reduced the charge before trial to murder in the second degree in one case;[48] and waived the death penalty in five cases.[49] In the remaining two cases, the jury found aggravating circumstances but rejected imposition of a death sentence.[50] Thus, the judgment of prosecutors and juries in Missouri has been that the death penalty is not an appropriate punishment for those who commit a crime at the age of 16 years old or younger. The actions of prosecutors and juries are particularly relevant because they are the ones who are faced, in the first instance, with the "question whether a sentence of death is excessive in the particular circumstances of any case" and are, therefore, "best able 'to express the conscience of the community on the ultimate question of life or death.'"

[45] *State* v. *Taylor*, CR83-2951 (Jackson County, February 9, 1984).

[46] *State* v. *Jones*, 699 S.W.2d 525 (Mo. App. 1985); *State* v. *Mouser*, 714 S.W.2d 851 (Mo. App. 1986).

[47] *State* v. *Atkins*, CR686-65F (Johnson County); *State* v. *Harris*, CR387-15FX (Phelps County); *State* v. *Jones*, CR87-6282 (Jackson County); *State* v. *Simpson*, CR286-2F (Jasper County).

[48] *State* v. *Boyland*, 728 S.W.2d 583 (Mo. App. 1987).

[49] *State* v. *Carr*, 687 S.W.2d 606 (Mo. App. 1985); *State* v. *Cason*, 596 S.W.2d 436 (Mo. 1980), *cert. denied*, 449 U.S. 982 (1980); *State* v. *Dayringer*, SD 15249-1 (Mo. App., July 26, 1988); *State* v. *Steward*, 734 S.W.2d 821 (Mo. banc 1987); *State* v. *Wilson*, ED 54624 (appeal pending).

[50] *State* v. *Allen*, 710 S.W.2d 912 (Mo. App. 1986); *State* v. *Scott*, 651 S.W.2d 199 (Mo. App. 1983).

Spaziano v. *Florida*, 468 U.S. 447, 470 (1984) (Stevens, J., dissenting) *quoting Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968).

Missouri's experience is not unique. There has been a dramatic decline in the number of people who are on death row for crimes committed while age 16 and younger. This stands in stark contrast to the rapid growth in the adult death row population. Between December 31, 1983, and June 30, 1988, the total death row population *increased by 69 percent* (from 1,209 to 2,048). *See:* United States Department of Justice, *Capital Punishment 1984* 16 (1985), and NAACP Legal Defense and Education Fund, Inc., Death Row, U.S.A. 1 (May 1, 1988). During the same period, the death row population of those sentenced for crimes committed while age 16 and younger *decreased by 30 percent*, from 10 to 7 (*See* Appendices D and E).

The seven persons currently under sentence of death for crimes committed at age 16 and younger constitute only 0.3 percent of the 2,048 persons now on death row. Of these seven, two will soon have their death sentences reversed under *Thompson*. Both were 15 at the time of their crimes and both were sentenced in states (Indiana and Louisiana) which had no specified minimum age limit. *See Thompson*, 108 S.Ct. at 2695 n. 26 (plurality opinion). Each of the remaining five was sentenced to death in states that have no specific statutory minimum age for imposition of the death penalty (Alabama, Florida, Missouri, Oklahoma, Pennsylvania, *Id.*). Therefore, none of the 16-year-old children currently on death row has been sentenced by a state which has "rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of [17] at the time of the offense. *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring). In those states where the execution of 16-year-olds is expressly permitted, there is not a single 16-year-old (nor anyone younger) under sentence of death.

"Legislative authorization, of course, does not establish acceptance." *Furman* v. *Georgia*, 408 U.S. at 278-79 (Brennan, J., concurring).

Like those who have served on juries, when asked directly, a majority of the American citizenry indicates disapproval of the death penalty for juveniles. For example in Georgia (which historically has executed more juveniles than any other state), polls show that two-thirds of the people were found to currently believe that life imprisonment should be the maximum punishment for juveniles. Washington Post, July 19, 1988 (Health) at 16.

Additional evidence of a national consensus against executing 16-year-olds can be found in the actions of professional groups concerned with our legal system, including those specifically involved with the juvenile justice system. As noted in *Thompson*, the legal profession's most respected groups (the American Bar Association and the American Law Institute), are on record in opposition to the execution of those below the age of 18. *Thompson*, 108 S.Ct. at 2696 (plurality opinion). The National Commission on Reform of Federal Criminal Laws also takes the position that the minimum age for imposition of the death penalty should be 18. *See* National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code § 3603 (1971). Since *Thompson*, the National Counsel of Juvenile and Family Court Judges, one of the nation's oldest and largest judicial membership organizations, and the organization whose members have the most relevant experience and concern, passed a resolution opposing "capital punishment of those who committed an offense while under the age of eighteen years." Resolution #2, July 14, 1988.

Consensus may also be found in the views of the moral arbiters of society, the nation's religious leadership. As the amici brief of the religious organizations reflects,

there is pervasive opposition to the execution of juveniles within the religious community.

Finally, evidence exists that the international community disapproves of the execution of 16-year-old children.[51] Amnesty International recorded 11,000 executions throughout the world between January 1980 and May 1986. Only eight were of people under the age of 18 at the time of the offense. Three of those eight executions took place in the United States.[52] *See* Amnesty International, *United States of America: The Death Penalty* 74 (1987). Of even greater relevance, the United States has signed and/or ratified three international human rights treaties[53] which forbid the imposition of capital punishment for crimes committed by persons below 18 years of age. See *Thompson*, 108 S.Ct. at 2707-08 (O'Connor, J., concurring).

A determination of the "evolving standards of decency," *Trop* v. *Dulles*, 356 U.S. at 101, does not require the

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[51] Prior decisions of this Court provide precedent for the propriety of examining the international community's attitude toward the specific punishment under review. *See Trop* v. *Dulles*, 356 U.S. 86, 102-03 (1958); *Coker* v. *Georgia*, 433 U.S. 584, 596 n. 10 (1977); *Enmund* v. *Florida*, 458 U.S. 782, 796 n. 22 (1982).

[52] Each of these three executions involved juveniles over the age of 16 (Terry Roach, Charles Rumbaugh, Jay Pinkerton). V. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 385 (1986).

[53] Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. DOC A n. 6316 (1966) (United States a signatory); Article 4(5) American Convention on Human Rights, O.A.S. Official Records, OEA/ser K/XVI n. 1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (United States a signatory); Article 68, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (United States a ratifying country).

Court to find unanimity among the objective sources of data before a judgment can be made as to what the standards of decency are. This Court should add its own informed judgment to the quite pervasive consensus that the execution of any person for a crime committed before the age of 17 offends our current standards of decency and is, therefore, a cruel and unusual punishment. The Court's judgment can be buttressed by an examination of the justifications for the practice, and its lack of any measurable contribution to any legitimate goal of punishment.

III. THE EXECUTION OF AN OFFENDER WHO WAS 16 AT THE TIME OF THE OFFENSE WOULD MAKE NO MEASURABLE CONTRIBUTION TO ANY LEGITIMATE GOAL OF PUNISHMENT

A punishment is unconstitutionally excessive if "it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U.S. at 592.

In *Gregg* v. *Georgia*, 428 U.S. 153 (1976), this Court recognized two legitimate penological goals served by the death penalty: retribution and deterrence.[54] Neither goal is served by the execution of 16-year-old offenders.

A. Retribution

Retribution, as used by the Court in the Eighth Amendment context, refers to the need for citizens to express their moral outrage at particularly offensive con-

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[54] In affirming Heath Wilkins' sentence of death, the Missouri Supreme Court identified incapacitation as the penological goal to be served by his execution (J.A. 94). However, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano* v. *Florida*, 468 U.S. 447, 461 (1984).

duct, and thereby to feel satisfied that the criminal has gotten what he deserves for the harm he inflicted. *Id.* What an offender "deserves," of course, is measured not only by the nature of the act committed, but by the personal moral culpability of the offender when committing the act. *Tison* v. *Arizona*, ___ U.S. ___, 107 S.Ct. 1676, 1683 (1987).

An evaluation of the moral culpability of a 16-year-old requires some understanding of the 16-year-old's capacity to truly understand the nature and consequences of his actions, and to control his emotional drives. Moral culpability implies an understanding of the array of good or malevolent choices, an ability to choose between them, and a conscious decision to choose the bad. *See Morissette* v. *United States*, 342 U.S. 246, 250 n. 4 (1952).

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.

Eddings v. *Oklahoma*, 455 U.S. 104, 115 n. 11 (1982) (*quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime*, 7 (1978)).

There is a difference between simple factual understanding and the true understanding that comes from experience and maturity. A 16-year-old who drag races a car down a freeway at 120 miles an hour will be able to say, when asked, that such an act is "dangerous." But since he does not *experience* the danger the way an adult would, he does not avoid the behavior. *See Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion) ("minors often lack the experience, perspective, and judgment to recog-

nize and avoid choices that could be detrimental to them.") He does not experience the danger the way an adult would, in particular, because one of the key attributes of an adolescent mind is its rejection of the possibility of death. R. Kastenbaum, and R. Aisenberg, *The Psychology of Death*, 26-35 (1972). Adolescents of every generation have engaged in dangerous, risk-taking behavior—like antagonizing dangerous animals, jumping from inordinately high places, or racing with speeding trains on the tracks—because they are at that interim stage when they are beginning to experience themselves as a life force independent from their parents, but have not yet fully realized that life can be instantaneously and permanently extinguished. Sixteen-year-olds who kill may have some factual recognition that their acts will produce death, but they lack sufficient understanding of what that means to hold them fully morally accountable. "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice, but of environmental pressures (or lack of them) or of other forces beyond their control." *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 552 (1971) (White, J., concurring).

Nor do 16-year-olds have the capacity to understand and control the powerful emotional winds to which they are subject. Slamming doors, hostile silences, tearful confrontations, biting sarcasm and/or proclamations of dreaded humiliation mark the household of the most normal adolescent. "Adolescence is well recognized to be a time of physiological and psychological change and stress. Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." D. Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry, 584, 588 (May, 1988) (hereinafter cited as Lewis, *Neuropsychiatric*). Impulsiveness is especially

relevant to the issue of moral culpability. A person who is responding to impulses beyond his control has traditionally been viewed as less culpable than the cold-blooded, rational criminal. *See California* v. *Brown*, 479 U.S. 538, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).

Finally, in many ways in our society, when children are still of an age to require parental control, the parents are held responsible for harm inflicted by the child.[55] While parents are not held criminally liable for the acts of their children, there is still the recognition that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school and social system, which share responsibility for the development of America's youth." *Eddings* v. *Oklahoma*, 455 U.S. at 115 n. 11 (*quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime*, 7 (178)); *see also*, J.A. 106 (Welliver, J., dissenting) ("utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs.").

The failure of developmental influences is particularly acute among juveniles who have committed a homicide. "The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and in which there are conflicts, disharmony, and poor parent-child relationships."[56] National Institute for Juvenile Justice and Delinquency

[55] *See, e.g.*, Mo. Rev. Stat. § 537.045 (1986). Parents or guardians liable for property damage or personal injury intentionally caused by unemancipated minor under the age of 18.

[56] The effect of these harmful environmental factors on Heath Wilkins is clear. At the time he committed the murder for which he received the death penalty, Heath was a 16-year-old boy suffering from a "profound developmental arrest" with no ability to use logic or reason to control his emotional impulses (J.A. 47).

Prevention, U.S. Dept. of Justice, *The Prevention of Serious Delinquency, What to Do?* 24 (1981), *cited in* Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1495 (1983). Adolescents who murder often share a common background of parental brutality, neglect or absence. Sendi, I.B., and Blomgren, P.G., *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*. 132 Am. J. Psychiatry 423 (1975), *see also* D. Lewis, *et al.*, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161 (1985). The only systematic study of juveniles on death row in this country concluded that "above and beyond the[] [normal] maturational stresses, homicidal adolescents sentenced to death have had to cope with brain dysfunction, cognitive limitations, severe psychopathology, and violent, abusive households." Lewis, *Neuropsychiatric*, *supra* p. 37 at 588. A child raised under such circumstances is likely to have an underdeveloped ego; less capacity to form mature judgments; less ability to control emotional impulses; and is more likely to experience uncontrollable impulses of rage. Sendi and Blomgren, *supra* at 423.

"[J]uveniles accused of a capital offense are uniquely vulnerable; they lack the maturity or insight to recognize the importance of psychiatric or neurological symptoms to their defense; and they are dependent on family for assistance in a way that adult offenders are not." Lewis, *Neuropsychiatric*, *supra* at 588-89. Unfortunately, "the very family members on whom these juveniles must rely to assist them in their defenses often collude with each other, the juvenile, and the attorney to minimize or conceal entirely the violence and abusiveness experienced in the home." *Id.*[57] While an adult may still be the product of

[57] When Heath Wilkins was asked if he could present mitigating

his upbringing, time and additional life experiences have usually provided him with the opportunity to change and overcome bad influences. A 16-year-old has not had such a chance.

Retribution is not served by the execution of 16-year-old offenders, who do not share with adults the capacity for mature judgment and control of behavior,[58] and thus do not "deserve" the ultimate penalty of death, no matter how heinous the offense.

B. Deterrence

Given the characteristics of 16-year-olds who commit murder, the execution of a 16-year-old would not have a deterrent effect on other 16-year-olds.[59] This is true because of two major characteristics: 1) they do not contemplate the consequences of their actions; and 2) they do not fear death.

Sixteen-year-olds as a class, and certainly those who commit murder, neither think through consequences nor weigh alternatives in decision-making. C. Lewis, *How Adolescents Approach Decisions: Changes Over Grades 7-12 and Policy Implications*, 52 Child Development 538-544 (1981); Kohlberg, *Development of Moral Character and Moral Ideology* in *Review of Child Development and Research* 404-05 (M. Hoffman and L. Hoffman, eds. 1964). They live for the moment and have little appreciation that their decisions will have consequences. Kastenbaum, *Time and Death in Adolescence*, in *The Meaning of Death* 99 (H. Feifel, ed. 1959). "With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process." C. Bartollas, *Juvenile Delinquency* 102 (1985). Without a full contemplation that the death penalty may be the consequence of their homicidal behavior, the deterrent effect of a potential death sentence is lost.

Sixteen-year-olds believe in their own indestructibility and have not yet developed a full appreciation for the finality of death. *See* R. Lonetto, *Children's Conception of Death* 134-41 (1980); Muuss, *Social Cognition, David Elkind's Theory of Adolescent Egocentrism*, 17 Adolescence 249, 256 (1982). Their sense of omnipotence leads them, in the first place, to believe that they will not be caught for their offenses. But even if they contemplate being caught and contemplate being executed, the thought holds no terror for them. As in Health Wilkins' case, the thought of incarceration for the rest of their lives may hold more sway than death itself. To Heath, incar-

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evidence in his defense, he responded, "I don't know of any mitigating circumstances. They were saying that my background history was poor, but I don't think that anybody should drag other people into this." (J.A. 63). Wilkins did not want his mother's physical abuse of him brought out because "he likes his mother" and did not want to jeopardize their relationship, which has improved since his incarceration (J.A. 63-64).

[58] The fact that an adolescent is capable of planning and concealment behavior does not answer the question of moral culpability. A four-year-old child is capable of planning and concealment, as when he plans to sneak into his father's room the next time dad is distracted elsewhere so that he can play with the calculator he is forbidden to touch. When the calculator breaks, he knows to hide it, or to blame a sibling or the dog. Yet a four-year-old would never be held morally responsible for a homicide. Heath Wilkins planned to poison his mother and her abusive boyfriend when he was ten, but would not have been eligible for the death penalty had he succeeded, despite his capacity to "plan."

[59] When considering the deterrent effect of the death penalty, of course, one must have in mind not the mature, responsible 16-year-old who would not consider committing murder in any case, but the 16-year-olds who *do* commit murder, as we know them to be.

ceration meant life in constant pain; death escape from pain. He could not imagine the third alternative: a life without constant pain.

Any potential deterrent effect the death penalty might have for 16-year-olds is competely negated by the infrequency of its use. A juvenile who paid attention to the ages of those executed would know that the odds are almost nil that a 16-year-old would be executed. Offenders 16 years old or younger account for 4.8 percent of all persons arrested for willful criminal homicide (*See* Appendix F). Only 0.3 percent of all offenders age sixteen or younger arrested for willful homicide receive the death sentence (*See* Appendices F and G), and so far none have been executed since 1959, ancient history to someone born in 1972.[60]

Given the strong evidence of consensus against the use of the death penalty for 16-year-olds, and given the characteristics of 16-year-olds that militate against use of the most severe sanction against them, the issue of deterrence should be resolved by requiring the State to justify the use of the ultimate penalty with proof that it does, in fact, deter homicides by 16-year-olds.[61]

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[60] The infrequency of juvenile executions means that removing this class from those death-eligible will have no measurable impact on the overall use of the death penalty, and thus no impact on the general deterrent effect, if any, of the death penalty.

[61] Several members of the Court have questioned whether the death penalty serves as a deterrent at all. See *Spaziano* v. *Florida*, 468 U.S. at 480 (Stevens, J., dissenting); *Furman* v. *Georgia*, 408 U.S. at 302 (Brennan, J., concurring); *id.* at 353-54 (Marshall, J. concurring).

IV. THE EXECUTION OF HEATH ALLEN WILKINS WOULD BE CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE MISSOURI COURTS NEVER CONSIDERED HIS AGE, MATURITY OR MORAL RESPONSIBILITY

Even if this Court were to decide that the execution of those who committed their crimes while under the age of 17 is not *per se* cruel and unusual punishment, the execution of Heath Wilkins would violate the Eighth and Fourteenth Amendments. In sentencing Heath to death, the State of Missouri failed to carefully consider his age, maturity or moral responsibility.

In *Thompson*, the plurality, concurrence, and dissent agreed that the propriety of the death penalty for juveniles depends on a consideration of maturity. The dissent found that Wayne Thompson had been sentenced to death only after an individualized consideration of his maturity and moral responsibility. *Thompson*, 108 S.Ct. at 2712 (Scalia, J., dissenting). No such individualized consideration of Heath's maturity and moral responsibility has ever been made. Heath Wilkins did not even benefit from a "rebuttable presumption that he [was] not mature and responsible enough to be punished as an adult." *Id.* The Missouri statutory mechanism for transferring children from juvenile court to courts of general jurisdiction did not require the court to find that Heath was sufficiently mature and responsible to be treated and punished as an adult. All that was required was a finding that he had committed a very serious offense, and that the juvenile court system did not have the capacity to respond adequately. Once transferred to the courts of general juris-

diction, Heath Wilkins' age was irrelevant to the imposition and affirmation of his death sentence.

The juvenile court relinquished jurisdiction over Heath Wilkins because the "viciousness, force and violence" of his crime indicated "that the person guilty thereof [was] not a fit subject for rehabilitative facilities of the Juvenile Court." (J.A. 5). The court also noted "that only 17 months of rehabilitative confinement or treatment [were] available and . . . such a period [was] not adequate to rehabilitate him and protect society from him." (J.A. 5). The juvenile court relinquished custody over Heath Wilkins because he had been charged with a serious and vicious crime, not because he was an exceptionally mature and responsible 16-year-old boy.

In doing so, the juvenile court's decision was consistent with Missouri case law on this issue. "The ultimate purpose of the transfer of a juvenile . . . is to protect the *public* in those cases where rehabilitation appears impossible." *State ex rel. Arbeiter* v. *Reagan*, 427 S.W.2d 371, 377 (Mo. banc 1968) (emphasis in the original). A particular child's amenability to rehabilitation has nothing to do with maturity. Instead, the courts look at three factors: the seriousness of the offense, the age of the child at the time of certification, and, the availability of services. Thus, in *State* v. *Kemper*, 535 S.W.2d 241 (Mo. App. 1975), a 15-year-old boy accused of murder was certified to be tried as an adult because there were no available psychiatric facilities exclusively for juveniles, and because the boy would need more than five years of treatment. In *State* v. *Owens*, 582 S.W.2d 366 (Mo. App. 1979), a 15-year-old boy accused of rape was certified to be tried as an adult because of the "vicious nature of the crime" *id.* at 374, and because he needed supervision not available within the Division of Youth Services. *Id.* As the Missouri Supreme Court has noted, "[w]hether vel non the establishment of long term confinement centers for violent

juvenile offenders might be advisable, the juvenile court has the duty to review the amenability of the juvenile to treatment resources *presently available.*" *In Interest of A.D.R.*, 603 S.W.2d 575, 582 (Mo. 1980) (emphasis in original). The fact that maturity is not considered in the certification process is well illustrated by the following two cases. *In Interest of A.D.R.*, *supra*, involved the certification of a 16-year-old boy. The Missouri Supreme Court upheld the certification of A.D.R. in part because of the boy's "demonstrated lack of impulse control" and his habit of associating "with people that seem to lead him on or talk him into more serious offenses." *Id.* at 581. *State of Missouri* v. *Mouser*, 714 S.W.2d 851 (Mo. App. 1986), involved the certification of a 16-year-old boy charged with capital murder. Arguing that certification was improper, Mouser pointed to evidence of his low intelligence and immaturity. *Id.* at 858. In upholding certification, the Court of Appeals held that:

> Dr. Urie, the clinical psychologist in the case stated appellant had an average to above average level of intellectual functioning. He also testified to appellant's immaturity and tendency to make decisions emotionally rather than intellectually. Taking all of this testimony into consideration, the juvenile court was within its discretion in finding that appellant was intellectually average.

Id. A survey of Missouri cases addressing the certification issue revealed none in which a child was certified to stand trial as an adult on the basis of the child's maturity and moral responsibility. The individualized consideration of maturity necessary to determine whether Heath Wilkins "deserved" to be punished by death was not made as part of the process which resulted in his being tried as an adult.

After Heath Wilkins was transferred to the court of general jurisdiction, he was considered and treated as an adult. This, too, is in accordance with Missouri law. Once

the juvenile petition is dismissed and the juvenile is tried under the general law as an adult, protections of the juvenile code terminate. *State of Missouri* v. *Pierce*, 749 S.W.2d 397 (Mo. banc 1988). That Heath Wilkins was then 17 years old was irrelevant to the circuit court's determination that he was competent to represent himself and plead guilty. The judge had found Wilkins mentally competent, and so believed that Wilkins had a constitutional right to represent himself which the court was obligated to respect (Tr. 62).[62]

The court either ignored or failed to recognize the testimony and actions which evidenced Heath's immaturity. For example, Heath's desire for the death penalty was based on his belief "that the imposition of sentence would be rather immediate and that he would be able to get out of a period of incarceration which he found distasteful" (Tr. 22). Heath's ability to plan was limited to the immediate future (Tr. 32), and certainly did not encompass any real appreciation for the finality of death, either his victim's or his own. (*See, e.g.*, J.A. 37, 65; Tr. 297-98). In addition, Heath's impulsive, immature behavior and style of decision-making were well documented (J.A. 16, 21, 46, 50, 70, 73), but were never considered. Instead, the court continuously relied on its finding that Heath was mentally competent.

Arguing for the death penalty, the prosecutor equated Heath's age with that of his victim, who was not a minor,

[62] Mo. Rev. Stat. § 211.071.7(2) requires the juvenile court to enter a finding that the "child was represented by counsel" if the juvenile court dismisses the petition to permit prosecution under the general law. It is not clear from that whether a juvenile could be permitted to represent himself. In civil law however, minors lack legal capacity to appoint counsel and such appointment, if made, is invalid and "absolutely void." *State ex rel. Dyer* v. *Union Electric Co.*, 309 S.W.2d 649 (Mo. App. 1958), *quoting Hodge* v. *Feiner*, 78 S.W.2d 478 (Mo. App. 1935).

but a 26-year-old woman (Tr. 293-94). That was the extent of the discussion of Heath's youth as a factor to be considered in determining the appropriate punishment. In fact, no individualized consideration of Heath Wilkins' age, maturity or moral responsibility was possible because no one involved in the process had an interest in seeing that they were considered. Instead, there was a 17-year-old boy asking the court to let him die. The court, as it had at every stage of the process, acceded to Heath Wilkins' request, and sentenced him to death (Tr. 301).

The Missouri Supreme Court failed to address the constitutionality of executing someone for a crime committed at the age of 16, despite having been asked to do so (J.A. 102 n. 8). The Court made it clear by its opinion that because Heath Wilkins had been found mentally competent,[63] his age at the time of the offense was irrelevant. (*Id.* at 89.)

Interestingly, the Court found most blameworthy that feature of Heath Wilkins' character which can best be explained by his age. The Court found Heath's attitude toward human life the "most chilling factor to be considered." (*Id.* at 94). Extreme indifference to human life, including one's own, is one aspect of adolescence, as dis-

[63] The Court's finding that the "overwhelming and uncontroverted evidence on this record" established that Heath Wilkins met "and continues to meet" the "basic test of competency" is remarkable in two respects. First, it ignores the conclusion of Dr. S.D. Parwatikar, in a report the court itself had ordered on appeal, that Heath Wilkins "was *not* competent to waive his Constitutional Rights and represent himself in front of the court" (J.A. 74), and the Court's appointment of defense counsel in light of Dr. Parwatikar's finding (J.A. 80). Second, the finding of competency was not an inquiry into maturity, but whether Heath was actively psychotic. (Whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand the proceedings against him or to assist in his own defense." Mo. Rev. Stat. § 552.020.3(1) (Supp. 1984)).

cussed *supra* at 37. *See also* Ellison, *State Execution of Juveniles: Defining "Youth" as a Mitigating Factor for Imposing a Sentence of Less Than Death*, 11 Law and Psychology, 1, 32 (1987); R. Lonetto, *Children's Conception of Death 134-41* (1980). Because the Missouri Supreme Court failed to consider the effect age had on Heath Wilkins' conduct and attitudes, it reached the erroneous conclusion that the only way to prevent him from killing again is to kill him first (J.A. 94). *See* Ellison, *supra* at 34 ("the juvenile murderer lacks the ability to empathize with his murder victim . . . because of the natural intellectual development of the juvenile, not because of his 'depravity of mind.'").[64] Had the Court considered Heath's age, it would have known that time alone will greatly reduce the probability that he will continue to engage in violent conduct. *See e.g.* California Youth Authority, *Offender-Based Institutional Tracking System* (1987) (76 percent of juvenile homicide offenders successfully completed parole compared to only 41.9 percent of juvenile non-homicide offenders.) Time, together with incarceration, can adequately protect society from Heath Wilkins.

The distinction between this case in which the death penalty was imposed, and the many cases involving 16-year-old offenders in which it is not, has nothing to do with maturity and moral responsibility. The distinction is that Heath Allen Wilkins asked for a sentence of death and the State of Missouri obliged him.

Heath Wilkins is typical of adolescents who commit murder. He shares the physical abuse inflicted on Monty

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[64] Describing this indifference to human life, the Court reports on attempts Heath had made to kill other people, including his mother (J.A. 94). The Court fails to mention, however, that the "attempt" to kill his mother occurred when Heath was ten years old (J.A. 29). One is left with the impression that had his plot succeeded, his age would again have been irrelevant.

Lee Eddings,[65] the impulsiveness exhibited by William Wayne Thompson,[66] and the severe psychopathology found to exist in the fourteen juveniles currently on death row studied by Dr. Dorothy Lewis and her colleagues.[67] The execution of Heath Wilkins would be cruel and unusual punishment because it would serve no legitimate penological purpose. It would be cruel and unusual because no individualized consideration of Heath's age, maturity or moral responsibility has ever been made. Finally, it would be cruel and unusual because it would offend the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Missouri Supreme Court insofar as it affirmed the death sentence, and grant such other relief as it deems appropriate.

Respectfully submitted,

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[65] *Eddings* v. *Oklahoma*, 455 U.S. at 104 (1982).

[66] *Thompson* v. *Oklahoma*, 108 S.Ct. 2687 (1988).

[67] Lewis, *Neuropsychiatric*, *supra* p. 37, *cited in Thompson*, 108 S.Ct. at 2699 n. 42.

APPENDIX

APPENDIX A

PERTINENT STATE STATUTORY PROVISIONS PROVIDING DIRECT OR INDIRECT MINIMUM DEATH PENALTY AGES

Direct Statutory Age Limit Specifically for Death Penalty

Age 18
(11 States)

CALIFORNIA: Cal. Penal Code sec. 190.5 (Supp. 1987).

COLORADO: Col. Rev. Stat. sec. 16-11-103(1)(a) (Repl. 1986).

CONNECTICUT: Conn. Gen. Stat. Ann. sec. 53a-46a(g)(1) (1985).

ILLINOIS: 38 Ill. Ann. Stat. sec. 9-1(b) (Supp. 1987).

MARYLAND: 27 Md. Code sec. 412 (f) (Supp. 1987).

NEBRASKA: Nebr. Rev. Stat. sec. 28-105.01 (Supp. 1985).

NEW JERSEY: N.J. Stat. Ann. sec. 2A:4A-22(a) & 2C:11-3g (Supp. 1987).

NEW MEXICO: N.M. Stat. Ann. sec. 28-6-1(A) & 31-18-14(A) (Repl. 1987).

OHIO: Ohio Rev. Code Ann. sec. 2929.02(A) (Page 1984).

OREGON: Ore. Rev. Stat. 161.620 & 419.476(1) (1987).

TENNESSEE: Tenn. Code Ann. sec. 37-1-102(3), (4); 37-1-103; & 37-1-134(a)(1) (Repl. 1984).

Age 17
(4 States)

GEORGIA: Ga. Code Ann. sec. 17-9-3 (1982) (see also Bankston v. State, Ga. S.Ct., Apr. 20, 1988).

NEW HAMPSHIRE: N.H. Rev. Stat. Ann. sec. 630:5(XIII) (Supp. 1987).

NORTH CAROLINA: N.C. Gen. Stat. sec. 14-17 & 21-B:1 (Supp. 1987).

TEXAS: Tex. Penal Code Ann. sec. 8.07(d) (Supp. 1988

Age 16
(3 States)

INDIANA: Ind. Rev. Code Ann. sec. 35-50-2-3 (Supp. 1987).

KENTUCKY: Ky. Rev. Stat. Ann. sec. 640.040 (1) (1987).

NEVADA: Nev. Rev. Stat. sec. 176.025 (1986).

Indirect Statutory Age Limit for any Criminal Court Jursidiction

Age 15
(2 States)

LOUISIANA: La. Rev. Stat. Ann. sec. 13:1570(a) (5) (1983).

VIRGINIA: Va. Code Ann. sec. 16.1-269(A) (1982).

Age 14
(5 States)

ALABAMA: Ala. Code sec. 12-15-34(A) (1977).

ARKANSAS: Ark. Stat. Ann. sec. 41-617(2) (Supp. 1985).

IDAHO: Idaho Code sec. 16-1806A(1) (Supp. 1988).

MISSOURI: Mo. Rev. Stat. sec. 211.071 (1986).

UTAH: Utah Code Ann. sec. 78-3a-25(1) (Supp. 1985).

Age 13
(1 State)

MISSISSIPPI: Miss. Code Ann. sec. 43-21-151 (1985).

Age 12
(1 State)

MONTANA: Mont. Code Ann. sec. 41-5-206(1)(a) (1987).

States* With No Direct or Indirect Statutory Age Limit

Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, Washington, and Wyoming.

*Pre-*Furman* statute still in the Vermont Code has no minimum age limit but statute is clearly unconstitutional and not in use by Vermont authorities.

APPENDIX B

JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES, BY DECADE, JANUARY 1, 1900, THROUGH JUNE 30, 1988

Decade	Total Executions	Juvenile Executions Age 16 & Younger	
1900-09	1,192	10	(0.8%)
1910-19	1,039	7	(0.7%)
1920-29	1,169	5	(0.4%)
1930-39	1,670	6	(0.4%)
1940-49	1,288	22	(1.7%)
1950-59	716	8*	(1.1%)
1960-69	191	0	(0%)
1970-79	3	0	(0%)
1980-88**	97	0	(0%)
Totals:	7,385	58	(0.8%)

*Last person executed for a crime at age 16 or younger was Leonard M. Shockley, executed in Maryland on April 10, 1959. (V. Streib, Death Penalty for Juveniles 118-119, 197 (1987))

**Data current as of June 30, 1988.

Sources of Data: W. Bowers, Legal Homicide 54 (1984); V. Streib, Death Penalty for Juveniles 191-208 (1987); NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 1 (May 1, 1988).

APPENDIX C

DEATH SENTENCES IMPOSED FOR OFFENDERS AGE 16 AND YOUNGER AT THE TIME OF THE CRIME, JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	[NO SENTENCES IMPOSED]				
1983	Cannaday, Attina	16	W	MS	reversed in 1984
	Harvey, Federick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	now on death row
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
1984	Aulisio, Joseph	15	W	PA	reversed in 1987
	Brown, Leon	15	B	NC	reversed in 1988
	Thompson, W. Wayne	15	W	OK	reversed in 1988
1985	Morgan, James	16	W	FL	now on death row
	Ward, Ronald	15	B	AR	reversed in 1987
1986	Cooper, Paula R.	15	B	IN	now on death row
	Lynn Frederick	16	B	AL	now on death row
	Sellers, Sean	16	W	OK	now on death row
	Wilkins, Heath	16	W	MO	now on death row
1987	Dugar, Troy	15	B	LA	now on death row
1988*	[NO SENTENCES IMPOSED]				

*Current as of June 30, 1988.

APPENDIX D

PERSONS ON DEATH ROW AS OF DECEMBER 31, 1983, FOR CRIMES COMMITTED WHILE AGE 16 OR YOUNGER

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Jackson, Carnel	16	male	black
	Lynn, Frederick	16	male	black
Florida	Morgan, James	16	male	white
Kentucky	Ice, Todd	15	male	white
Mississippi	Cannaday, Attina	16	female	white
	Mhoon, James	16	male	black
Nevada	Harvey, Frederick	16	male	unknown
N. Carolina	Oliver, John	14	male	black
Oklahoma	Eddings, Monty	16	male	white
Pennsylvania	Hughes, Kevin	16	male	black

*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); and V. Streib, Death Penalty for Juveniles 31 (1987).

APPENDIX E

PERSONS ON DEATH ROW AS OF JUNE 30, 1988, FOR CRIMES COMMITTED WHILE AGE 16 OR YOUNGER

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Lynn, Frederick	16	male	black
Florida	Morgan, James A.	16	male	white
Indiana	Cooper, Paula R.	15	female	black
Louisiana	Dugar, Troy	15	male	black
Missouri	Wilkins, Heath	16	male	white
Oklahoma	Sellers, Sean	16	male	white
Pennsylvania	Hughes, Kevin	16	male	black

*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (May 1, 1988); and Streib, Persons on Death Row as of June 24, 1988, for Crimes Committed While Under Age Eighteen (June 24, 1988) (unpublished report prepared by V. Streib, Cleveland State University).

APPENDIX F

ARRESTS FOR WILLFUL CRIMINAL HOMICIDE, BY AGE GROUPS, JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Arrests for All Ages	Arrests for Age 16 & Younger	% of Arrests for All Ages
1982	18,511	846	4.6%
1983	18,064	768	4.3%
1984	13,676	582	4.2%
1985	15,777	772	4.9%
1986	16,066	844	5.3%
1987	15,903	870	5.5%
1988*	(8,000)**	(425)**	(5.3%)**
Totals:	105,997	5,107	4.8%

*data current as of June 30, 1988

**estimated because exact data unavailable

Sources of Data: *Thompson* v. *Oklahoma*, 56 U.S.L.W. 4892, 4897 (1988) (Stevens, J., plurality opinion); UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1987); *id.* at 174 (1986); *id.* at 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendices B, C, D, and E.

APPENDIX G

DEATH SENTENCES FOR WILLFUL CRIMINAL HOMICIDE, BY AGE GROUPS, JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Death Sentences For All Ages	Death Sentences For Age 16 & Younger	% of Death Sentences For All Ages
1982	284	0	0%
1983	259	5	1.9%
1984	280	3	1.1%
1985	273	2	0.7%
1986	297	4	1.3%
1987	(280)*	1	(0.4%)*
1988**	(140)*	0	0%
Totals:	1,813	15	0.8%

*estimated because exact data unavailable

**data current as of June 30, 1988

Sources of Data: *Thompson* v. *Oklahoma*, 56 U.S.L.W. 4892, 4897 (1988) (Stevens, J., plurality opinion); UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1985 6 (1987); *id.* at 6 (1984); and Appendices B, C, D, and E.

APPENDIX H

LAWS OF MISSOURI RESTRICTING THE RIGHTS AND RESPONSIBILITIES OF CHILDREN 16 YEARS-OLD

Mo. Rev. Stat. Section[1]	Statute	Age
71.740	Minors[2] may be prohibited by their municipality from buying cigarettes and cigarette wrappers	
115.133	Vote	18
188.028	Obtain abortion without parental consent	18
167.031	Compulsory school attendance	16
194.220	Make anatomical gift, to take effect upon death	18
208.040	Parent eligible for aid dependent children until child reaches 18. (19 if full-time student in secondary school)	18
210.110	"Child" for purposes of child abuse statute	18
210.115	Court may order medical care where child does not receive medical treatment because of religious beliefs of parents	18
210.481	"Child" for purposes of foster care statute	18
211.021	"Child" for purposes of juvenile code	17
211.151	Child not to be detained in jail or adult detention facility pending disposition of a case	17

[1] All cites are to Missouri Revised Statutes (1986) unless otherwise indicated.

[2] The age of majority is not uniform in Missouri and no age is mentioned in the statute.

Mo. Rev. Stat. Section	Statute	Age
211.171	Juvenile cout hearings held separately from trial of cases against adults; general public excluded from hearings	17
211.271	Juvenile court adjudication not deemed a conviction	17
211.321	Juvenile court records kept separately; not open to inspection; may be sealed when child reaches 17	17
211.442	"Minor" and "child" for purposes of termination of parental rights statute	18
219.071	Children committed to division of youth services not to be transported or detained with criminals or vicious and dissolute persons	17
307.178	Mandatory seat belt use	4-16
313.280	Purchase lottery tickets	18
313.670	Wager on horse race	18
318.090	Patronize pool halls where liquor served	21
311.310 et seq.	Purchase intoxicating liquor	21
346.025	If purchaser of hearing aid under 18 has not been examined by physician, hearing aid fitter must recommend in writing that purchaser be examined	18
351.050	Capacity to incorporate	18
404.007 et seq.	Receive transfer of property without intercession of adult custodian	21

Mo. Rev. Stat. Section	Statute	Age
431.055 et seq.	Enter into contracts	18
431.061	Consent to medical treatment of all types	18
431.067	Minor[3] may borrow money for higher education; has all rights, powers, privileges and obligations of adult.	
431.068	Donate blood without parental consent	17
434.060	Parents of minor may sue and recover money or property lost by minor in gambling	18
442.035	Where married to adult spouse, may not convey estate by entireties without participation of conservator or guardian ad litem	18
442.080	Conveyance of real estate by person under 18 voidable	18
451.090	Marry without parental consent	18
423.025 453.030	Give up child for adoption without guardian ad litem or be adopted without guardian ad litem	18
473.110 473.117	Act as personal representative for administration of estate	18
474.310	Make a will	18
475.055	Be declared a legal guardian	18
475.345	Sale, exchange, lease, gift, or contract by protectee while under 18 is voidable unless entered with consent of conservator	18

[3] *See* Footnote 2.

Mo. Rev. Stat. Section	Statute	Age
494.010	Sit as juror	21
507.110 507.115	Commence, prosecute, or defend action in own name	18
516.030 527.220	In suits for recovery of land and cases of lost deeds, statutes of limitations tolled until disability of infancy removed	21
542.220	Municipality by proclamation may impose curfew against minors[4] for periods up to three days	
546.740	Witness an execution	21
563.061	Use of corporal punishment by parents, guardians, teachers, against minors permitted	
565.140	Restraint by parent, guardian or relative with purpose to control child does not constitute false imprisonment	17
568.070	Pawn property or sell to junk dealers	18
	Purchase blasting caps, bulk gunpowder, or explosives	17
571.060	Obtain blackjack or firearm	18
571.090	Obtain permit to acquire concealable firearm	21
573.040	Purchase pornography	18
568.060	Abuse of a child—proscribes knowing infliction of cruel and inhuman punishment of a child under 17, photography or filming of a child under 17 engaging in prohibited sexual act or permitting child to engage in act for purpose of photography or film	17

[4]*See* Footnote 2.

Mo. Rev. Stat. Section	Statute	Age
491.678 et seq.	Child victim witness protection law—video recording of child victim may be used as substantive evidence and defendant may be excluded from the child's deposition proceeding under certain circumstances	17
537.045	Custodial parent or guardian liable for payment of judgment up to $2,000 for acts of vandalism or purposeful personal injury by minor	18
556.061	Defines sexual performance for purposes of criminal code as any performance or part thereof which includes sexual conduct by a child under 17	17
573.010, RSMo Supp. 1987	Child pornography, material or performance depicting sexual conduct, contact, or performance and having as participant or observer child under age 18	18
577.500, RSMo Supp. 1987	One year revocation of driver's license for persons under 21 determined to have committed certain alcohol, controlled substance, and/or motor vehicle offenses	21

OCCUPATIONS

Mo. Rev. Stat. Section	Statute	Age
190.145	Ambulance attendant or driver or Emergency Medical Technician	18
329.070	Apprentice or student cosmetologist, hairdresser or manicurist	17

Mo. Rev. Stat. Section	Statute	Age
330.030	Podiatrist	21
326.060	Certified public accountant	21
327.131	Architect	21
327.221	Professional engineer	21
327.312	Land surveyor-in-training	21
328.080	Barber	17
331.030	Chiropractor	21
294.120	Miner or quarry worker	18
302.060	Chauffeur's license	18
302.272, RSMo Supp. 1987	School bus operator	21
311.300	Seller of intoxicating liquor or non-intoxicating beer	21
311.300	Bartender	21
332.131	Dentist	21
333.041	Funeral director or embalmer	18
334.530	Professional physical therapist	21
335.046	Registered professional nurse	19
	Licensed practical nurse	18
336.030	Optometrist	21
337.020	Psychologist	21
338.030	Pharmacist	21
339.040	Real estate broker or salesperson	18
341.170	Master plumber	25

Mo. Rev. Stat. Section	Statute	Age
	Jouneyman plumber	21
	Master drain layer	25
334.030	Nursing home administrator	21
346.055	Hearing aid fitters and dealers	21
354.235	Enrollment representative for health services corporation	18
375.091	Insurance brokers	18